A

DATUK ABDUL RASHID ASARI v. LEE BENG SENG (ON BEHALF OF IDAMAN PELITA SDN BHD); MAJLIS PEGUAM MALAYSIA (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
B [ORIGINATING SUMMONS NO: 17D-26-06-2014]
30 NOVEMBER 2015

LEGAL PROFESSION: *Professional discipline – Procedure – Appeal against suspension – Consent judgment by parties that report by first investigating tribunal*
C *('IT') be set aside – Constitution of second IT – Whether Disciplinary Board ('DB') had jurisdiction to constitute second IT – Whether DB complied with ss. 99 & 100 of Legal Profession Act 1976 – Whether decision of DB pursuant to recommendation of Disciplinary Committee void ab initio – Whether function of Disciplinary Committee restricted to considering report of IT – Legal Profession Act 1976,*
D *ss. 103A(a), 103B(1), 103D & 103D(2)*

On 23 March 2006, the Disciplinary Board ('DB') received a complaint against the plaintiff by the defendant. Acting on the complaint, the DB proceeded to constitute an investigation tribunal ('IT') on 23 August 2006 ('the first IT') under s. 100(1) of the Legal Profession Act 1976 ('LPA'). The
E first IT investigated and reported its findings to the DB which was affirmed by the DB and the DB decided to constitute a Disciplinary Committee ('DC') to formally investigate the complaint. Pending the inquiry by the DB, the plaintiff commenced an originating motion against the DB and a consent judgment ('CJ') was entered into by the parties to the originating motion with
F the terms, *inter alia*: (i) the report by the first IT be set aside; (ii) the DC appointed to investigate the complaint to be dissolved; and (iii) the complaint be remitted to the IT to hear the respondent's explanation and to submit a new report. Subsequently, the DB constituted and appointed a fresh IT ('the second IT') to investigate the complaint lodged by the defendant against the
G plaintiff. The second IT produced a report recommending that a formal investigation was unnecessary. The DB disagreed with the report leading to the constitution of a DC to conduct a formal investigation against the plaintiff. The DC in its report found that the conduct of the plaintiff was unbefitting of an advocate and solicitor and recommended to the DB for the
H plaintiff to be suspended from legal practice for three months. Consequently, on 16 May 2014, the DB made an order under s. 103D and 103D(2) of the LPA to affirm the DC's findings. However, the DB enhanced the period of suspension to six months. Hence, the plaintiff sought leave to appeal against the decision of the DB and a consequential order that the decision of the DC which recommended that the plaintiff be suspended from practice as
I advocate and solicitor for three months be set aside.

Held (allowing plaintiff's application with costs):

(1) The amendment to the LPA was made in 2006 and the enforcement date of the amended LPA was on 2 October 2006. The complaint in this case was lodged on 23 August 2006, *ie* before the coming into force of the amended law. The first IT was constituted before the coming into force of the amended law and therefore, for the purpose of this appeal, the pre-amended law should be applicable. (para 12)

(2) It was explicit that for all intent and purposes, the terms used in the CJ envisaged that the matter be referred to the earlier and/or original IT to hear the explanation of the plaintiff and to prepare a fresh report. The CJ did not envisage that a new IT was to be constituted in order to start the whole process all over again. It was not part of the CJ for the first IT to be dissolved. The DB had no jurisdiction to constitute the second IT and therefore, it had acted outside the scope of the CJ when it constituted the second IT for the complaint to be heard all over again. Hence, the whole process culminating in the decision taken by the DB on 16 May 2014 was void *ab initio* and infected with jurisdictional error. (para 12)

(3) Sections 99 and 100 of the LPA provide for the procedure to be adopted by the DB in cases where an application or complaint concerning the conduct of an advocate and solicitor and/or a pupil is made to the DB. It would appear from the reading of s. 101 of the LPA that the jurisdiction of the IT to investigate into an application or complaint into the conduct of an advocate or solicitor or pupil is triggered only when the DB receives a complaint which it considered meritorious whereupon the DB shall constitute an IT. The DB has no jurisdiction to constitute an IT if there is no complaint. The DB had not complied with the provisions of ss. 99 and 100 of the LPA in constituting the second IT and therefore, the second IT was not properly constituted under the law. (para 12)

(4) The DC conducted a full hearing and investigation, purportedly under s. 103B – 'or to investigate and make recommendations to the DB under s. 103A'. However, the DC had no such power or jurisdiction. The DC appointed in the circumstances where an IT has been appointed, has no power to investigate under s. 103B(1). Pursuant to s. 103A(a), the DC carries out its investigative powers under s. 103B 'in respect of cases under s. 103A' and may do so because no IT has been appointed. However, since the IT has been constituted, the function of the DC was restricted to considering the report of the IT. Hence, the entire disciplinary process against the plaintiff, after the event of the consent order, was infected with jurisdictional error. (para 12)

Legislation referred to:
Legal Profession Act 1976, ss. 99, 100(1), 101(4), 102(2)(b), 103A(1)(a), 103B(1), 103D(1), (2), (3), 103E(6)
Rules of Court 2012, O. 15 r. 4(2)

For the plaintiff - Kamarul Hisham Kamarudin, Hasnal Rezua Merican & Mohd Ruzaini Zulkifli; M/s The Chambers of Kamarul Hisham & Hasnal Rezua
For the respondent - Hariharan Tara Singh & Suzanna Tai; M/s TS Hariharan & Partners
For the intervener - Wong Leong Hong; M/s The Law Office of LH Wong

Reported by S Barathi

JUDGMENT

Asmabi Mohamad J:

Introduction

[1] By an originating summons dated 23 June 2014 ("OS") the plaintiff has sought, amongst others, for leave to appeal against the decision of the Disciplinary Board ("DB") given on 16 May 2014 wherein the DB had affirmed the disciplinary committee's ("DC") findings on liability and ordered that the plaintiff be suspended from practice as an advocate and solicitor of the High Court of Malaya for a period of six months (see exh. "DRA-10" of encl. 2).

[2] The appeal was made pursuant to s. 103D of the Legal Profession Act 1976 ("LPA"). The plaintiff has also sought for a consequential order that the decision of the DC made on 14 May 2013 which recommended that the plaintiff be suspended from practice as an advocate and solicitor for three months to be set aside by this court. The plaintiff had also prayed for costs and other reliefs this court deems fit.

The Documents

[3] For the purpose of this OS the following documents were filed and referred to by the court:

(a) Affidavit in support affirmed by the plaintiff on 17 June 2014 ("encl. 2");

(b) Affidavit in support (2) affirmed by the plaintiff on 13 August 2014 ("encl. 6");

(c) Affidavit in reply by the intervener affirmed by Wee Thiam Seng on 27 August 2014 ("the intervener's affidavit in reply") ("encl. 9");

(d) Affidavit in reply by the defendant by one Lee Beng Seng affirmed on 9 September 2014 ("encl. 10");

(e) Affidavit in reply by the plaintiff affirmed by the plaintiff 25 September 2014 ("encl. 11");

(f) Affidavit in reply (2) affirmed by the plaintiff on 25 September 2014 ("encl. 12"); and

(g) Affidavit in reply (2) by the intervener affirmed by Wee Thiam Seng on 3 October 2014 ("encl. 13").

[4] By an originating summons dated 16 July 2014 the Bar Council of Malaysia applied for leave to intervene pursuant to s. 103E(6) of the LPA read together with O. 15 r. 4(2) of the Rules of Court 2012 ("ROC"). Leave to intervene was granted on 6 August 2014.

Grounds Of Challenge

[5] The grounds to challenge the DC and subsequently the DB's orders were as stated in paras. 19 to 21 of encl. 2. The summary of which is as follows:

(i) the process which led to the order made by the DB dated 16 May 2014 was defective and/or irregular and/or in contravention and/or *ultra vires* the LPA:

(a) The DB had contravened ss. 100(1) and 101 of the LPA and/or had on 12 June 2008 acted *ultra vires* the LPA by establishing the Second Investigating Tribunal without having received a complaint from the complainant;

(b) The DB had acted in contravention of s. 100(1) and 101 of the LPA by establishing the Second Investigating Tribunal based on the consent order dated 20 May 2008 when the same had not been statutorily provided by the LPA;

(c) The jurisdiction of the Second Investigating Tribunal established on 12 June 2008 was only limited to consider the explanation of the plaintiff and had no jurisdiction to conduct an investigation as provided under s. 101 of the LPA. Therefore the Second Investigation Tribunal was not a legally constituted tribunal;

(d) As the DB had established a disciplinary committee under s. 102(2)(b) of the LPA based from a report of an entity which was not properly constituted, the establishment of the DC was null and/or void *ab initio*;

(e) As the constitution of the disciplinary committee was void *ab initio* the actions of the DB pursuant to s. 103D(3) was void *ab initio*; and

(f) Even if the DC was legally constituted, which was denied by the plaintiff, the DC only had the power pursuant to s. 103B(1) of the LPA, in cases where an Investigating Tribunal had been constituted,

to consider a report of the Investigating Tribunal. The acts of the DC herein to conduct an inquiry and to fully hear the complaint was irregular and/or *ultra vires* the LPA.

[6] Further and in the alternative, the plaintiff contended that the findings of facts and law made by the DC which was subsequently affirmed by the DB that there was misconduct was obviously wrong based on the following:

(a) The mistake of the plaintiff, even if existed (which was denied) in interpreting the term 'stakeholding' and 'undertaking' could not be termed as misconduct as the interpretation made by the plaintiff had been held as correct by the High Court of Malaya *vide* Civil Suit No. MT3-22-278-2003 ('MTSA suit') (the parties in the MTAS suit). It was only a misinterpretation which did not tantamount to misconduct. (Note: In MTSA suit the defendant and the plaintiff herein were the plaintiff and the defendant respectively. For ease of reference I would refer to them in the same manner they were referred to herein).

(b) The action of the plaintiff to issue cheques from the plaintiff's client's account purportedly as refund of the "stakeholding" and/or the "undertaking", which payment was subsequently ordered to be stopped by the plaintiff, did not amount to a misconduct as the plaintiff's action was influenced by inducement, coercion and threat. The findings of the learned High Court Judge pertaining to the existence of factors such as inducement, coercion and threat at the time of the purported acts had not been disturbed, set aside and/or altered by the Court of Appeal; and

(c) The findings of fact by the DC were perverse and against the weight of the evidence and against the doctrine of reasonableness in the sense that a tribunal similarly circumstanced would not have arrived at the same findings.

[7] The punishment imposed by the DC which was further enhanced by the DB was unreasonable, excessive and without taking into consideration all the mitigating factors in favour of the plaintiff.

Background Facts

[8] The background facts leading to this appeal could be stated as follows:

(a) On 23 March 2006 a complaint was lodged against the plaintiff by one Lee Beng Seng on behalf of the defendant, Idaman Pelita Sdn Bhd (see exh. "DRA-1" of encl. 2)

(b) Acting on the complaint the DB had *vide* a letter dated 23 August 2006 constituted an Investigating Tribunal ("IT") to inquire into the complaint pursuant to s. 100(1) of the LPA (see exh. "DRA-2" of encl. 2).

(c) By a letter dated 29 June 2007, the DB affirmed the report of the IT and decided to constitute a DC to formally investigate the complaint under s. 102(2) and 103B of the LPA (pre-amendment) (see exh. "DRA-3" of encl. 2).

(d) Pending the inquiry by the DB the plaintiff commenced an originating motion against the DB *vide* Originating Motion No. R2-17-92-2007. On 20 May 2008, a consent judgment was entered into by the parties to the originating motion with the following terms ('CJ'):

(i) the report by the IT dated 1 March 2007 to be set aside;

(ii) the DC appointed to investigate the complaint to be dissolved; and

(iii) the complaint to be remitted to the IT to hear the respondent's explanation and to submit a new report.

(see exh. "DRA-4" of encl. 2).

(e) On 15 October 2010, the DB constituted and appointed a fresh IT ("second IT") to investigate the complaint lodged by the defendant against the plaintiff (see exh. "DRA-11", Annexure S of encl. 6).

(f) On 30 September 2010 the MTSA Suit had been dismissed. An appeal was lodged by the defendant to the Court of Appeal to appeal against the said decision (see exh. "DRA-11", Annexure S of encl. 6).

(g) On 23 November 2010, the second IT produced a report ("second IT's report") recommending that a formal investigation is unnecessary (see exh. "DRA-11", Annexure S of encl. 6).

(h) By a letter dated 26 April 2011 the plaintiff and the defendant were informed that the DB disagreed with report of the second IT and decided to constitute a DC to conduct a formal investigation against the plaintiff (see exh. "DRA-11", Annexure T of encl. 6).

(i) The plaintiff who was the defendant in the MTSA suit being dissatisfied with the decision of the Court of Appeal had on 25 November 2011 filed for leave to appeal to the Federal Court against the Court of Appeal Amended Order. The leave application was heard and dismissed by the Federal Court (see exh. "DRA-11", Annexure U of encl. 6).

(j) On 31 May 2012 a DC was constituted by the DB to inquire into the defendant's complaint against the plaintiff (see exh. "WTS-2" of encl. 13).

(k) The DC prepared a report dated 14 May 2013 and in its report the DC had unanimously found that the conduct of the plaintiff was unbefitting of an advocate and solicitor and recommended to the DB for the plaintiff to be suspended from legal practice for a period of three months (see exh. "DRA-11", Annexure U of encl. 6).

(l) On 16 May 2014 the DB made an order under s. 103D and 103D(2) of the LPA to affirm the DC's findings. However the DB did not agree with the three month's suspension from legal practice recommended by the DC. Instead the period of suspension from three months recommended by the DC was enhanced to six months (see exh. "DRA-11", Annexure W of encl. 6).

Submissions By The Respective Parties

For The Plaintiff

[9] The plaintiff, among others, raised the following arguments:

(a) The DB has no jurisdiction to constitute the second IT under s. 100 of the LPA if there is no complaint lodged with the DB. Without a complaint before the DB the second IT has no jurisdiction to investigate into a complaint.

(b) As the first IT had issued its report on 1 March 2006 the first IT is *functus officio*.

(c) The jurisdiction of the DB is solely determined by statue, namely ss. 99 and 100 of the LPA. Therefore, the DB has no jurisdiction to appoint a new IT having received no complaint.

(d) The CJ could not confer jurisdiction to the DB to appoint a second IT.

(e) Further, if the second IT was constituted its function was only to give the plaintiff the opportunity to be heard. Therefore, the report of the second IT (the subject matter of the hearing) is incompetent under the law as the DB had no jurisdiction to constitute the second IT and the second IT was not an IT pursuant to s. 100 of the LPA.

(f) Due to incompetent report which had occasioned the DB to constitute the DC under s. 102(2)(b) of the LPA whose recommendation was not accepted by the DB under s. 103D(1) of the LPA had rendered the whole process against the plaintiff void *ab initio*. Hence, there was jurisdictional error.

(g) The DC has no power to investigate. The DC which was appointed conducted a full hearing and investigation purportedly under s. 103B and made a recommendation to the DB under s. 103A. This could not be done as under s. 103B(1), the DC may only "consider, in cases where an Investigation Tribunal has been appointed, the report of the Investigation Tribunal". In the instant case was where an IT had been appointed.

(h) The power to investigate and make recommendations arises only where the Investigation Tribunal had not been appointed.

(i) Under s. 103B(1) where an IT has been appointed, the DC may only consider the report of the IT. Therefore, to invest the DC with the power to investigate when an IT had been appointed would be in contravention of s. 103B(1).

(j) The process leading to the DB's decision on 16 May 2014 was infected with jurisdictional error.

(k) Further the plaintiff in this case had not committed any misconduct. The crux of the complaint was whether the plaintiff's firm had rightly released the sum of RM500,000 paid by the defendant as stakeholder to the plaintiff.

(l) Prior to the complaint lodged by the defendant, the defendant had commenced an action against the plaintiff's firm *vide* MTSA suit, which cause of action was similar to the complaint.

(m) The MTSA suit had been dismissed by the High Court and on appeal to the Court of Appeal, the said court had allowed the defendant's appeal. The plaintiff being dissatisfied with the decision of the case had appealed to the Court of Appeal which had allowed the appeal. The plaintiff's application for leave to appeal to the Federal Court was dismissed by the Federal Court.

(n) Despite having reversed the judgment of the High Court, the Court of Appeal did not interfere with the finding of facts made by the High Court. The Court of Appeal had a different interpretation of the term stipulated in the letter dated 24 May 1999 and had interpreted the term to include a situation where if there is no agreement concluded between MAIS and the plaintiff, the plaintiff ought to have refunded the RM500,000 to the defendant. The court did not hold that the plaintiff had breached any fiduciary duty.

(o) Despite the different interpretation, the plaintiff's interpretation of the terms of the stakeholding was accepted by the High Court. Hence the plaintiff's interpretation could be taken as reasonable and was not done with malice, improper or dishonest motive.

(p) The basis of the complaint was on the terms of the stakeholding as stated in letters dated 24 May 1999 and 29 May 1999 read together with the defendant's Board of Director's resolution dated 21 June 1999 ("Board's resolution"). This proposition was rejected by the High Court and the Court of Appeal. The findings of the High Court that the terms stated in the Board's resolution dated 21 June 1999 did not from part of the stakeholding, was not disturbed and/or reversed by the Court of Appeal. Hence, the terms of the stakeholding were only restricted to the letters dated 24 May 1999 and 29 May 1999.

(q) Hence, there were two reasonable interpretation, in that, the RM500,000,00 would only be refunded to the defendant if the proposal for the joint venture was rejected or the said RM500,000 could only be released to the plaintiff in event the joint venture between MAIS and the defendant was achieved. These interpretations were reasonable and did not involve dishonest motive.

(r) The subject matter of the complaint raised the same issue that had been determined by the MTKL Suit as well as by the Court of Appeal. Both these courts had made a factual finding that the terms contained in the Board's resolution did not form part of the terms of the undertaking.

(s) Without the terms stipulated in the said resolution, the terms as stipulated in the letters dated 24 May 1999 and 29 May 1999 shall be applicable. These terms again were subject to two reasonable interpretations as mentioned above, the RM500,000 would be refunded to the defendant if there was a rejection of the proposal of the joint venture by MAIS or the RM500,000 could be released to the plaintiff if the joint venture agreement between MAIS and the defendant materialised.

(t) The fact remained none of these courts had made a finding that there was a dishonest motive on the part of the plaintiff.

For The Intervener

[10] Learned counsel for the intervener, amongst others, raised the following arguments:

(a) The complaint to the DB was never withdrawn. The complaint was given the number, IT/06/2445 by the DB (see exh. "DRA-11", in encl. 6).

(b) The second IT report specifically referred to the letter of complaint dated 23 March 2006 made by the defendant against the plaintiff.

(c) The certificate of appointment of the second IT as in exh. WTS-1 in encl. 9, specifically stated that the second IT was appointed pursuant to s. 100 of the LPA to investigate the defendant's complaint against the plaintiff from Messrs Rashid Asari & Co.

(d) The plaintiff's contention that the second IT appointed by the DB based on the CJ was contrary to ss. 100(1) and 101 of the LPA was devoid of any merits. The CJ did not stipulate that a new IT was to be constituted to hear the explanation of the plaintiff. Despite this the DB had proceeded to appoint the second IT.

(e) The certificate of appointment of the second IT dated on 15 October 2010 in exh. WTS-1 of encl. 9 had provided that the second IT appointed under s. 100 of the LPA to investigate the complaint against the plaintiff of Messrs Rashid Asari & Co made by the defendant.

(f) The plaintiff's assertion that the second IT appointed on 12 June 2008 was invalid and with limited jurisdiction to hear the plaintiff's explanation and was not vested with the powers of an IT constituted pursuant to s. 101 of the LPA was without any basis as the second IT was appointed on 15 October 2010 and not 12 June 2008. This was supported by the second IT's report.

(g) The letter dated 12 June 2008 as documented in exh. DRA-5 in encl. 2 made no mention that the new IT was appointed on this date. Further exh. WTS-1 of encl. 9 had stated clearly that the second IT was to investigate the complaint.

(h) The consent order did not stipulate that a new IT was to be constituted to hear the plaintiff's explanation. Despite this, the DB went ahead to appoint the second IT.

(i) The notes of evidence in the second IT report showed that besides hearing the plaintiff's explanation, the report had disclosed that the second IT had heard the evidence of the defendant and the submissions of the respective parties.

(j) The plaintiff's contention that the DB had appointed the DC under s. 102(2)(b) of the LPA (pre-amendment) premised from a report from an entity that was not an IT validly constituted, therefore the DC constituted is invalid *ab initio*. This was without any merits because the second IT was validly constituted under s. 100 of the LPA.

(k) With regard to the contention of the plaintiff that as the DC was invalid *ab initio* and the actions of the DB pursuant to s. 103D(3) of the LPA too was void *ab initio*, the defendant asserted that based on the above stated reasons the plaintiff's contention was devoid of any merits.

(l) With respect to the plaintiff's contention that even if the DC was validly appointed, it only had the power pursuant to s. 103B(1) of the LPA to consider the second IT report and the action of the DC to conduct the investigation and the full hearing was irregular and/or *ultra vires* the LPA, the defendant asserted that this contention was not supported by law as the DC was appointed pursuant to s. 102(2) and s. 103B of the LPA (see the certificate of appointment of the DC-Exhibit "WTS-2" of encl. 13).

(m) The findings of the DC that the plaintiff had committed a 'misconduct' which the plaintiff considered as erroneous as the High Court had also favoured the same view, the Intervener contended that this was also devoid of merits as the decision of the High Court had been reversed by the Court of Appeal. There was no further appeal to the Federal Court on this issue, therefore the DB was correct in relying on the Court of Appeal decision. Further there were no written grounds provided by the Court of Appeal.

(n) The plaintiff's contention that the two letters could reasonably be interpreted in the manner that was interpreted by the High Court as well as the Court of Appeal could not be correct as the same had been disputed by the defendant. Further this was unsupported by documentary evidence. As there were no grounds provided by the Court of Appeal, there was nothing to support this contention.

(o) It was apparent from the DC's report that the plaintiff's firm as a legal stakeholder was under an obligation to refund the money to the defendant if the plaintiff failed to secure the project for the defendant.

(p) Even if there was a misinterpretation of the term of 'stakeholding' and/or 'undertaking' between the plaintiff and the defendant this was not a defence. Therefore, the DC was correct in holding that there was a breach of professional conduct which could be regarded as conduct unbefitting of an advocate and solicitor which had brought the legal profession into disrepute.

(q) With regard to the penalty imposed which the plaintiff argued to be grossly excessive, the intervener contended that what would be the suitable penalty to be imposed must be left to the members of the profession to decide and not the court, as what constitutes the proper conduct for the member of the profession, would be best left to the profession to decide on.

For The Defendant

[11] Except for a very brief written submission, on the whole, the defendant had adopted the points raised by the intervener in its written as well as oral submission.

Decision

[12] Having perused the cause papers, the various affidavits as well as the written submissions filed herein, the following are the reasons for my decision dated 6 March 2015:

Consent Judgment Clear & Unambiguous

(i) I will not go behind the history which led to the CJ as parties had highlighted the factual matrix leading to the CJ in each party's written as well as oral submissions.

(ii) at the outset and until the first date of the hearing before me, the plaintiff had taken the stand that when the DB, purporting to act on the authority of the CJ constituted the second IT, it purported to derive jurisdiction from the CJ. Learned counsel submitted that the DB being a creature created by statute could not derive its jurisdiction from the CJ as its jurisdiction was determined by ss. 99 and 100 of the LPA.

(iii) therefore, it was contended by the plaintiff, that the DB had no jurisdiction to appoint a second IT, as it had not received a new complaint to act upon. Further the original IT ('first IT') having submitted its report to the DB was already *functus officio*.

(iv) however, in the course of the continued hearing before me, learned counsel for the plaintiff had abandoned this argument and agreed that the CJ was legally entered into by the respective parties and the plaintiff having entered into the CJ could not at this juncture resile from the stand taken earlier. Learned counsel for the plaintiff had urged this court to examine the words of the CJ and give effect to the intention of the parties at the time the CJ was entered into.

(v) in view of the above, this court would have to examine the words of the CJ and give effect to the terms of the CJ dated 20 May 2008 (see exh. "DRA-4" of encl. 2). For ease of reference the terms of the CJ are reproduced below as follows:

(a) Laporan Tribunal Penyiasatan bertarikh 1hb Mac 2007 berkenaan Aduan No:IT/06/2445 oleh Pengadu, Lee Beng Seng bagi Idaman Pelita Sdn Bhd terhadap Plaintif 9 "Aduan tersebut") diketepikan;

(b) Jawatankuasa Tatatertib yang dilantik untuk menyiasat Aduan Tersebut dibubarkan dan pendengaran yang dijadualkan pada 21hb Mei 2008 dan 19hb Jun 2008 dibatalkan;

(c) Aduan tersebut dihantar semula (remitted) kepada Tribunal Penyiasatan untuk, mendengar penjelasan Plaintiff dan mengeluarkan Laporan Baru;

(d) Kebebasan untuk memohon; dan

(e) Tiada perintah terhadap kos.

(vi) the amendment to the LPA *vide* Act A1269/06 was made in 2006 and the enforcement date of the Amended LPA was on 2 October 2006. The complaint in this case was lodged on 23 August 2006 before the coming into force of the amended law. The first IT was constituted before the coming into force of the amended law. Hence, for the purpose of this appeal, the pre-amendment law shall be applicable. All issues relating to this appeal would have to be resolved by reference to the pre-amendment law.

(vii) pursuant to the above CJ, the report of the first IT dated 1 March 2007 relating to Complaint No: IT-06-2445 by the complainant, one Lee Beng Seng was set aside. The DC which was appointed to investigate the complaint made by the defendant *vide* Complaint No: IT-06-2445 to be dissolved. The complaint to be remitted to the Investigation Tribunal to hear the explanation of the plaintiff and to prepare a fresh report.

(viii) this court would have to examine the words of the CJ in order to determine if the subsequent process adopted by the DB was correct and within the parameters of the CJ.

(ix) upon reading Term c) of the CJ it would appear that both parties to the CJ had agreed for the complaint to be remitted to the Investigation Tribunal **to hear the explanation of the plaintiff and to prepare a fresh report.** (emphasis added)

(x) from the language that was used, I am of the view that for all intent and purposes, the terms of the CJ envisaged that the matter be referred to the earlier and/or original Investigation Tribunal to hear the explanation of the plaintiff and to prepare a fresh report. The language of the CJ was explicit and there were no two ways of reading the words of the CJ.

(xi) the CJ did not envisage a situation that a new Investigation Tribunal was to be constituted in order to start the whole process all over again. If that was the intention, both parties would have couched the language of the CJ towards that direction. One could not treat the complaint as having been commenced as Term c) of the CJ had clearly stated that the complaint was to be remitted to the IT for a fresh report to be issued. I am of the view that the CJ had envisaged that the complaint be sent back (note: the word used was "remitted") to the Original IT for a fresh report to be prepared. It was not part of the CJ for the first IT to be dissolved. If that was the intention parties to the CJ would have expressly provided this term in the CJ in the same manner that was provided for the dissolution of the DC.

(xii) further, pursuant to a letter dated 12 June 2008 issued by the DB to the plaintiff and the defendant (see p. 271 of encl. 6) the DB had informed both these parties that the purpose of the setting up of the second IT was only "to give the respondent the opportunity to be heard". It is observed that despite what was stated in the said letter the DB had decided to start the process all over again.

(xiii) thus, it is clear that the DB had acted outside the scope of the CJ when it constituted a second IT for the complaint to be heard all over again, irrespective of what the outcome of the second IT was, in this case it found in favour of the plaintiff. The second IT was wrongly constituted making the whole process that flowed from the decision of the DB to constitute the second IT leading to the imposition of six months suspension from practice by the DB on the plaintiff a nullity. This would include the decision of the DB to constitute the second IT to investigate the complaint, the commencement of the investigation, the reporting of the findings of the second IT of its investigations to the DB, the DB's decision not

to accept the second IT's findings, the constitution of the DC by the DB, the finding of guilt by the DC and the recommendation by the DC for the penalty of three months' suspension from practice to be imposed on the plaintiff were all tainted with illegality.

(xiv) in gist, I am of the view that the CJ had only envisaged a situation whereby the complaint to be referred to the first IT for the first IT to hear the explanation of the plaintiff and send a fresh report to the DB. In view of the above, I agree with the submission of learned counsel for the plaintiff that the DB had no jurisdiction to constitute the second IT and the whole process culminating in the decision taken by the DB on 16 May 2014 was void *ab initio* and infected with jurisdictional error.

Non-Compliance Of The Provisions Of ss. 99 & 100 Of The LPA

(xv) section 99 of the LPA provides that any complaint concerning the conduct of any advocate and solicitor or any pupil shall be in writing which shall be referred to the DB. The DB shall deal with the complaint in accordance with the LPA and/or rules made thereunder.

(xvi) sections 99 and 100 of the LPA provide that the procedure to be adopted by the DB in cases where an application or complaint concerning the conduct of an advocate and solicitor and/or a pupil is made to the DB. The DB must examine the complaint and if the DB considers that there is merit in the complaint, the DB shall forthwith constitute an Investigating Tribunal to investigate the complaint. Once the Investigating Tribunal is constituted by the DB, it shall within two weeks of its appointment or any further time as may be allowed commence an investigation into the complaint and as expeditiously or may be reasonably expected, it must report its findings to the DB. For the purpose of investigating the complaint under s. 100 of the LPA, the Investigating Tribunal may take all steps it deems necessary under s. 101 of the LPA.

(xvii) from the reading of s. 101 of the LPA it would appear that the jurisdiction of the IT to investigate into an application or complaint into the conduct of an advocate or solicitor or pupil is triggered only when the DB receives a complaint which it considers meritorious whereupon the DB shall constitute an IT. From the reading of the above-quoted section it would appear that a complaint is a pre-requisite. The DB has no jurisdiction to constitute an IT if there is no complaint. In short, without a complaint having been lodged to the DB, the DB is not vested with the jurisdiction to investigate into a complaint.

(xviii) Turning now to the case at hand, the DB had received the complaint on 23 March 2006 (see exh. "DRA-11", Annexure A of encl. 6). On 23 August 2006 the DB had constituted the first IT under s. 100(1) of the LPA. The first IT had investigated and reported its findings to the DB. However due to certain non-compliance of the provision s. 101(4) (ii) of the LPA, the report on the findings prepared by the first IT was set aside pursuant to the CJ entered into by the plaintiff and the defendant on 20 May 2008. The issue is whether after constituting the first IT which had acted pursuant to s. 101 of the LPA, the DB could constitute a second IT and commence the whole process under s. 101 of the LPA all over again.

(xix) upon perusal of the provision of the LPA, I am satisfied that the LPA had not catered for the situation faced by the DB herein. The second IT had in fact acted presumably pursuant to the complaint dated 23 March 2008 which had been acted upon by the first IT. There was no fresh complaint referred to the DB for the DB to consider if the complaint merit referral to the second IT for investigation or otherwise.

(xx) it would appear that the DB had not complied with the provisions of ss. 99 & 100 of the LPA in constituting the second IT. The jurisdiction of the DB, being a creature of statute, is solely determined by statute. It is apparent from the actions of the DB, the DB had no jurisdiction to constitute a second IT without a complaint and/or application to trigger it and/or without a decision by the DB that the complaint under s. 99 of the LPA merit referral to the second IT for investigation. In fact, the DB in this case had leapfrogged the provisions of ss. 99 & 100 of the LPA to constitute the second IT. As the DB had not complied with the provisions of ss. 99 & 100 of the LPA, to constitute the second IT, the second IT was not properly constituted under the law. The second IT would be invested with the jurisdiction to make a recommendation under s. 102(2) of the LPA only if it is properly constituted. As the second IT had not been properly constituted, all the process culminating in the decision taken by the DB on 16th May 2014 is void *ab initio*. I am of the view that the entire process from the constitution of the second IT leading to the six months suspension from practice by the DB was infected with jurisdictional error.

(xxi) in the case at hand, the DB had rejected the report of the findings of the second IT and ordered that a formal investigation be conducted by the DC. The next issue to be considered is whether the DB is vested with the power to determine that there should be a formal complaint under s. 103A.

(xxii) the instant case was an exercise of jurisdiction to appoint the DC under s. 102(2)(b) of the LPA. The DB did not invoke s. 103A of the LPA.

The DC Has No Power To Conduct An Investigation

(xxiii) the jurisdiction of the DB to appoint a DC is provided in s. 103A. This section stipulates three circumstances as stated therein. For our purpose, only 103A(1)(a) applies, that is where the DB "determines that there should be a formal investigation".

(xxiv) but the same jurisdiction is found in s. 102(2)(b), ie, where the DB disagrees with the recommendation of the IT that there should be no formal investigation, it may appoint a DC.

(xxv) the instant case was an exercise of jurisdiction to appoint the DC under s. 102(2)(b) (see letter dated 26 April 2011). Note that the DB therein correctly did not invoke s. 103A(1)(a).

(xxvi) the DC appointed conducted a full hearing and investigation, purportedly under s. 103B – "or to investigate and make recommendations to the Disciplinary Board under s. 103A".

(xxvii) the DC has no such power or jurisdiction for the following reasons:

(a) Under s. 103B(1), the DC may only "consider, in cases where an Investigating Tribunal has been appointed, the report of the Investigating Tribunal".

(b) The instant case was where an IT had been so appointed.

(c) The power "to investigate and make recommendations" in s. 103B(1) arises only where an Investigating Tribunal had not been appointed – see the disjunctive "or" in s. 103B(1).

(d) Section 103B(1) is explicit and clear that where an IT has been appointed, the DC may only consider the report of the IT.

(e) To invest the DC with the power to investigate, in circumstances where an IT has been appointed (the instant case) would be to fly in the face of an express and clear provisions of statute and to rewrite s. 103B(1).

(xxviii) pursuant to a recommendation of the IT under s. 102(2), to which the DB disagrees, the DB "determines that there should be a formal investigation" under s. 103A(1)(a), and proceeds to appoint a DC under s. 103B, that DC, appointed in circumstances where an IT has been appointed, has no power to investigate under s. 103B(1).

(xxix) it follows that such a DC cannot conduct a formal investigation which defeats the reason for it being appointed in the first place, ie, to conduct a formal investigation under s. 103A(1)(a).

(xxx) that means that where the IT recommends no formal investigation and the DB disagrees, the DC appointed has no power or jurisdiction to conduct the formal investigation, which the DB requires to be conducted.

(xxxi) it must follow that there are two separate jurisdiction/power of the DB to appoint DC to investigate, namely:

(a) Under s. 103A(1)(a), where the DB determines for itself upon receiving a formal complaint (and without going through the process of appointing an IT) that there should be a formal investigation; and

(b) Under s. 102(2)(b), where the DB disagrees with the recommendation of the IT.

(xxxii) where there are two separate powers, no anomaly occurs. In the circumstance of s. 102(2)(b), the DC appointed carries out its investigation on implied power. In the circumstances of s. 103A(a), the DC carries out its investigative powers under s. 103B "in respect of cases under s. 103A" and may do so because no IT has been appointed.

(xxxiii) it follows, in the instance case, since the IT has been constituted, the function of the DC is restricted to considering the report of the IT by the clear words of s. 103B(1).

(xxxiv) the entire disciplinary process against the plaintiff, after the event of the consent order was infected with jurisdictional error.

Conclusion

[13] Having considered the cause papers filed herein and having heard the arguments by the respective learned counsels for the plaintiff, the intervener as well as the defendant and having given the matter a very careful and serious consideration, accordingly I allowed the prayers sought by the plaintiff in his OS with costs. On the issue of cost all parties had agreed for each party to bear its own costs.